LIBRARY
SUPREME COURT, U.S.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 327

EMPRESA SIDERURGICA, S. A., a corporation of Colombia, South America, and VANDERBURGH & CO., INC., a California corporation,

Appellants,

vs.

COUNTY OF MERCED, a municipal corporation, J. EMMETT MCNAMARA, Assessor of the County of Merced, et al.,

Appellees.

APPELLANTS' REPLY BRIEF.

SCOTT D. KELLOGG,
1017 East Fourteenth Street, Oakland 6, California.
Counsel for Appellants.

Subject Index

Page

Introductory statement to appellants' reply to appellees' argument 2

Appellants' reply to appellees' arguments 5

I.

Appellees' argument that none of the property taxed had an export status on tax day is based upon an erroneous application of the facts 5

II.

Appellees' argument that an intent to export property does not confer upon the property an exempt status and neither does the existence of a contract of sale of property to be exported take into consideration the overt acts which committed the entire cement plant to exportation 14

III.

Appellees' argument that employment of a dismantler and a forwarding agent did not confer an exempt status upon the property taxed overlooks entirely the fundamental concept that the process of exportation starts with the first movement toward the sea 17

IV.

Appellees' argument that shipments prior to tax day of a portion of the property sold to a foreign purchaser did not confer exemption upon the property still remaining in the county on tax day is contrary to the decisions of this court 21

V.

Appellees' argument that movement such as was involved in the dismantling of the property was preliminary or preparatory in nature and was not the final movement out of the state launching the property upon its journey to a foreign destination is contrary to the principles laid down by this court 25

VI.

Page

Appellees' argument that no question of valuation is presented is conceded 27

VII.

Appellees' argument that the cases relied upon by appellants do not support the position for which appellants contend is contrary to fact 28

Conclusion 30

Table of Authorities Cited

Cases

	Pages
A. G. Spalding & Bros. v. Edwards, 262 U. S. 66	14, 16, 18, 28
Carson Petroleum Company v. Vial, 279 U. S. 95	19, 29
Clarke and Co. v. Clarke, 3 Woods 408	28
Coe v. Errol, 116 U. S. 517	7, 8, 9, 14, 27
Cornell v. Coyne, 192 U. S. 418	8, 9, 12, 14, 16, 27, 28
Dahnke Walker Milling Co. v. Bondurant, 257 U. S. 282	30
Heisler v. Thomas Colliery Co., 260 U. S. 245	9, 14
Hughes Bros. Timber Co. v. Minnesota, 272 U. S. 469	23, 29
Multnomah County v. Dant and Russell, Inc., 158 Ore. 350, 75 P. (2d) 986	30
Puget Sound Stevedoring Company v. Tax Commission, 302 U. S. 90	29
Railroad Commission v. Worthington, 225 U. S. 101	29
Richfield Oil Corp. v. State Board, 329 U. S. 69	11, 13, 14, 16, 17, 18, 20, 22, 23, 26, 29
State of Texas v. Anderson, Clayton & Co., 92 F. (2d) 104	29
Western Oil Refining Company v. Lipscomb, 244 U. S. 346	29

Statutes

United States Constitution:	
Article I, Clause 2, Section 10	2, 3
Article I, Clause 3, Section 8	1
Article I, Clause 5, Section 9	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 327

EMPRESA SIDERURGICA, S. A., a corporation of Colombia, South America, and VANDERBURGH & Co., INC., a California corporation,
Appellants,

vs.

COUNTY OF MERCED, a municipal corporation, J. EMMETT MCNAMARA, Assessor of the County of Merced, et al.,
Appellees.

APPELLANTS' REPLY BRIEF.

In replying to appellees' brief, we shall refer to our opening brief by the letter B and to appellees' brief by the letters AB. In the argument for brevity we shall sometimes refer to Clause 3, Section 8, Article I, of the Constitution as the commerce clause; to

Clause 2, Section 10, Article I, either as the export clause or the import-export clause; to Clause 5, Section 9, Article I, as the federal export clause. As all of the applicable provisions of the Constitution are in Article I, when we refer to them by clause and section we shall omit the article.

Also, as in our opening brief, we shall refer to appellant Empresa Siderurgica, S. A. as the foreign purchaser, appellants Vanderburgh & Co., Inc. as the export forwarding agent, Henry J. Kaiser Company as the domestic seller, Bigge Drayage Company as the contractor-common carrier, and The Atchison, Topeka and Santa Fe Railway Co. as the railroad common carrier.

All emphasis through this brief will be ours, unless it is indicated that italics are those of the text.

INTRODUCTORY STATEMENT TO APPELLANTS' REPLY TO APPELLEES' ARGUMENT.

Clause 2 of Section 10 in the most clear and explicit language prohibits any state without the consent of Congress from levying any tax or impost upon imports or exports. The clause by the clear language of the Constitution is an additional limitation upon the states not contained in the Commerce Clause, and was *precisely so intended by the framers of the Constitution.*

In the few cases which have been considered by this Court, clear and concise rules have been set forth

from which it may be readily determined whether or not the property intended for exportation has in fact become committed to exportation and is therefore an export within the meaning of the export clause. These principles may be summarized as follows:

1. It must be in existence.

2. It must be identified with reasonable certainty.

3. There must be a present intent to export it.

4. It must start to move in foreign commerce in good faith.

5. It must be exported.

Appellees do not challenge the fact that the cement plant was in existence, that the contract of sale identified the cement plant or property to be exported, that it was intended to export the cement plant, or that it was finally so exported. We believe, therefore, that the sole ultimate question in the case is whether or not a movement of part of the cement plant pursuant to a reasonably planned method of exportation which was actually expeditiously carried out in good faith, committed the entire cement plant to exportation.

Appellees in their statement of the case take issue with the fact that the cement plant was an entire, complete and operative cement plant and infer that Exhibit "B" attached to the contract of sale included items necessary to the operation of a cement plant. The complete answer to this position on the part of

appellees is Exhibit "B" itself and it is set forth in full in the appendix to this reply brief. Further than that, the contract with Bigge Drayage Company is replete with references to the methods to be used in dismantling in order that the cement plant could be readily reassembled at its destination. And then, of course, the export sales contract provides: "Seller represents that said cement plant was being operated until July 1, 1944, that Seller purchased said cement plant from its former operator in operating condition as of that time, and Seller warrants that it has not thereafter sold or removed any equipment or property from said cement plant except that listed in 'Exhibit B' ". (R. 25.) Furthermore, the export license recites that the articles and materials "constitute the total known requirements for this cement manufacturing plant". (R. 63.)

Appellees state that appellants' statement "the exportation of the cement plant was the only act to be done upon the consummation of the sale" is not correct for the record clearly shows that the property was sold in an undismantled condition. Truly the cement plant was sold in an undismantled condition. In fact the contract of sale states:

> "Whereas Purchaser has completely inspected and is fully familiar with said cement plant in its present condition and location and is desirous of buying said cement plant, with certain specific exceptions hereinafter mentioned in its present condition and as presently situated, for the purpose of exporting the said plant to the Republic of Colombia." (R. 23-24.)

While it is apparent that it was difficult to export an undismantled cement plant, nevertheless the one and only problem presented was its exportation. Whether the means selected were reasonably calculated to accomplish its exportation has been heretofore discussed in appellants' opening brief and will be hereafter amplified in this reply brief.

Appellees take exception to the designation of Bigge Drayage Company as "contractor-common carrier". It is, of course, true that Bigge Drayage Company was licensed as a common carrier of interstate and foreign commerce by the United States Interstate Commerce Commission. It is also true that Bigge dismantled and packaged the cement plant. Whether or not it acted as a common carrier, a contract carrier, or merely a contractor, his function, as pointed out in appellants' opening brief was one of the first steps and we emphasize necessary steps in the exportation of the cement plant.

APPELLANTS' REPLY TO APPELLEES' ARGUMENTS.

I.

APPELLEES' ARGUMENT THAT NONE OF THE PROPERTY TAXED HAD AN EXPORT STATUS ON TAX DAY IS BASED UPON AN ERRONEOUS APPLICATION OF THE FACTS.

An examination of the record reveals that the property sold to the foreign purchaser was a cement plant and that on tax day 14 carloads had left the County of Merced enroute by rail and boat to South America. And so appellees state that because the Board of

Supervisors of Merced County reduced the tax by 12%: "None of the property here taxed had been * * * started upon such transportation in a continuous route or journey." (A.B. 12.)

Appellees desire to disregard entirely that part of the property sold for export was moving by boat and railroad and that the activities of the export forwarding agent and the contractor-common carrier were integrated and an essential part of such movement.

Appellees state that all of the property taxed was still located at the plant site on tax day, March 5, 1945. What they mean is that a credit of 12% was given to appellants because 14 carloads had left the county and could not be taxed under any theory of law, and they then computed that the 88% of the plant which had not yet been loaded on railroad cars was still in the county and therefore taxable. But in what shape was that 88%. The process of exportation started on January 3, 1945, when title passed to the foreign purchaser and the export forwarding agent took delivery. In the two months which elapsed, 56% of the plant had been dismantled and of that 56% 14 car loads (12%) had been shipped, and 10% had been crated and packed. 44% had not been dismantled. But on tax day operations did not stop. For the period March 14, 1945, through March 21, 1945, 12 car loads left the county. (R. 85-86.) And continuing thereafter dismantling, packaging, and railroad shipments continued without cessation until the entire cement plant, the property sold to the foreign pur-

chaser, had completely left the County of Merced on its way to South America.

Appellees make much of the fact that 44% of the plant had not been dismantled. The answer is that the process of dismantling was proceeding with due diligence before tax day and continued expeditiously without cessation after tax day pursuant to the export sales contract and the contract with the Bigge Drayage Company. It was an integral part of the export process.

Citing *Coe v. Errol*, 116 U. S. 517, appellees argue that the activities of Bigge Drayage Company was preparation for shipment. Yet in *Coe v. Errol*, supra, not one log was moving. "There they were to remain *until it should be convenient* to send them to their destination." (p. 528.)

It could have been just as easily said that there they were to remain until it should be convenient to *sell them locally*.

Is that the instant case? By no stretch of the imagination are the cases analogous.

Further citing *Coe v. Errol*, supra, appellees disregard the clear and concise language employed by disregarding that part of the quotation at page 528 (A.B. 13-14) where it specifically says that this movement does not begin until the articles have been "started for transportation from the one State to the other." Can there be any question whatever that the cement plant had started to move as an article of commerce before tax day? We submit that there can be

no question and that movement had started far and beyond that required by the leading case of *Coe v. Errol*, supra.

Cornell v. Coyne, 192 U. S. 418, is cited by appellees in comparing the process of exportation by Bigge Drayage Company to that of manufacturing filled cheese.

An analysis of the two situations quickly reveal that they are not analogous. The manufacturing process brought into existence the filled cheese. Certainly it could not be an article of commerce until it was brought into being. However, in the instant case, the cement plant had already been manufactured. It was in being—there it stood in its undismantled condition—and upon the payment by the foreign purchaser to the domestic seller, title passed, delivery was taken by the export forwarding agent, and Bigge Drayage Company began the process of exportation by dismantling, packaging, and carrying it to the railroad spur and loading it on the railroad cars. What other manner could have been selected to export the cement plant? We submit that everything reasonably necessary for the exportation of the cement plant was done and that all actions taken were for one and only one purpose—that of exportation.

We cannot believe that appellees seriously believe that the raising of cattle, although later exported, can be compared to the process of exportation in which the Bigge Drayage Company was engaged. The portion of the decision in *Cornell v. Coyne*, supra, quoted by

appellees (A.B. 15) is easily answered. The cattle had not yet begun to move as articles of commerce. However, place the cattle which have been sold for export in a corral by a railroad track and when the first steer starts into the first car, it is respectfully submitted, that this is sufficient movement in commerce to commit the entire corral of cattle to exportation. And further, that if 12% of the cattle are loaded on railroad cars by noon on the first Monday in March in California, the balance of 88% in the corral are exempt from taxation under the export clause of the Constitution. Truly, by the very nature of things, they do not move all at one time.

Heisler v. Thomas Colliery Co., 260 U. S. 245, is cited by appellees as lending support to their position. Again, as in *Coe v. Errol*, supra, no part of the coal had started to move.

Appellees, again referring to *Cornell v. Coyne*, supra (A.B. 16-17), observe that dismantling involves preparatory activities in advance of shipment as does manufacturing. They refer to the substantial sum paid to Bigge Drayage Company for this work. Again we emphasize that the work of Bigge Drayage Company was so integrated with the work of the export forwarding agent, the carriage by the railroad and steamers that it was one continuous movement, each doing the work delegated to it to effect the exportation of the cement plant. It is not believed that the substantial sum paid to Bigge is indicative of anything other than that the project was one of great magnitude.

Coming next to the assertion by appellees (A.B. 17-18) that the record does not justify the statement by appellants that nothing was required to be done with the cement plant except to export it. As heretofore stated, the record shows conclusively that the cement plant was purchased at its then present location and as it was situated. It was needed in Colombia, South America in the form that it was purchased. It was a plant of great magnitude, requiring 123 car loads to transport it to the seaboard. The foreign purchaser provided for delivery of the plant in that condition to an export forwarding agent for shipment to it in South America. This is not an unusual situation. It is the custom in foreign trade for the foreign purchaser to instruct the seller to deliver the goods purchased to a designated export forwarding agent. The export forwarding agent, upon being designated by the foreign purchaser, takes such steps as are reasonably required to effect the exportation of the article. In the instant case, the export forwarding agent, was required to employ Bigge Drayage Company as part of the process of exportation. This again is not unusual, for many manufacturers do not have the facilities to package their products for export and in such cases, an export forwarding agent, upon being designated by a foreign purchaser to ship goods to him will instruct the domestic seller to deliver his products to an export packer as part of the export process.

In *Richfield Oil Corp. v. State Board*, 329 U. S. 69, cited by appellees, we believe, confirms the position of appellants. This Court said in part:

> "But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use." (p. 83.)

In the instant case, not only when the export forwarding agent and Bigge Drayage Company took delivery and began the work of dismantling but also when 14 carloads had left Merced County, there was nothing equivocal in the transaction which created even a probability that the cement plant would be sold locally.

This Court went on to say:

> *"The means of shipment are unimportant so long as the certainty of the foreign destination is plain."*
>
> *Richfield Oil Corp. v. State Board*, 329 U.S. 69. 83.

On pages 18 and 19 of appellees' brief, there is found a statement, which is believed to be misleading. Instead of dealing with the property (the cement plant in its entirety) as described in the contract of sale, appellees disregard entirely the part which was shipped. They say that because the tax was reduced by 12% because 14 car loads were shipped prior to tax day "that all of the property taxed was still at the plant site". To obtain a clear picture of that which

occurred, 14 carloads out of 123 carloads were on their way to South America by rail and boat. 109 carloads out of 123 carloads were in the process of exportation; that is, that which had not yet been dismantled was being dismantled, that which had not yet been crated and packaged was being crated and packed and that which had not yet been loaded on railroad cars was being loaded. Then appellees say: "None had been loaded on railroad cars or even placed in the possession of the Atchison, Topeka and Santa Fe Railway Company which was to carry the property from the plant site to the port of shipment." It would seem that a more accurate statement could be made. The record reveals that during the month of March, 1945, 20 carloads were billed and shipped by rail. (R. 85-86.) 6 cars were being loaded on tax day. (R. 84A.) It seems that by reducing the tax by an arbitrary percentage to attempt to compensate for shipments already completed on only part of an entire transaction, that appellees may then come before this Court and say none of the property has been started on its journey. Certainly there is no question but that 14 carloads had started on the journey and the balance were started as quickly as it was physically possible so to do.

Cornell v. Coyne, 192 U.S. 418, is again referred to by appellees (A.B. 19) after reasoning that none of the property had commenced the foreign journey, and therefore is subject to the tax. This erroneous assumption on the part of appellees induced by the fact that the tax was reduced by 12% can only and does lead them to a false conclusion. *Cornell v. Coyne*,

supra, is authority for the principle that exports are not relieved from the *prior* ordinary burdens of taxation. (p. 427.)

And on page 20 of their brief, appellees confirm that the California Supreme Court in this case, disregarded the fact that 14 carloads were moving in commerce as part of the entire export transaction by reason of the 12% reduction of the tax and arrived at the erroneous conclusion that none of the property was moving in export, and upon these erroneous conclusions applies the tests laid down in *Richfield Oil Corp. v. State Board*, 329 U.S. 69.

We submit that the California Supreme Court has held and appellees seek to have this Court hold that it is permissible for a county on tax day to reduce by an arbitrary percentage a tax on an export in the process of being exported and by reason thereof, he may disregard that which has already been shipped as committing the goods to exportation and tax the balance as being part of the general mass of property in the state, because that part of the export has not started to move. Appellees have not cited and we are not aware of any decision of this Court which justifies such a result.

II.

APPELLEES' ARGUMENT THAT AN INTENT TO EXPORT PROPERTY DOES NOT CONFER UPON THE PROPERTY AN EXEMPT STATUS AND NEITHER DOES THE EXISTENCE OF A CONTRACT OF SALE OF PROPERTY TO BE EXPORTED TAKE INTO CONSIDERATION THE OVERT ACTS WHICH COMMITTED THE ENTIRE CEMENT PLANT TO EXPORTATION.

There is no question but that mere intent to export property even under a contract of sale, without more, does not commit goods to exportation.

See:

Cornell v. Coyne, 192 U.S. 418;
Heisler v. Thomas Colliery Co., 260 U.S. 245;
Coe v. Errol, 116 U.S. 517.

But where there is a contract of sale and an intent to export property, coupled with the overt acts of starting the property on its journey, the subject of the sale in its entirety becomes an export and is not taxable.

See:

Richfield Oil Corp. v. State Board, 329 U.S. 69;
A. G. Spalding & Bros. v. Edwards, 262 U.S. 66.

This is the applicable principle in the instant case. Concisely the factors involved are as follows:

1. The export sales contract was executed by domestic seller and foreign purchaser for the purchase of a cement plant.

2. The contract intended shipment to Colombia, South America.

3. An export forwarding agent was designated to take delivery.

4. The export forwarding agent employed a contractor-common carrier to dismantle, package and load the cement plant on railroad cars.

5. An export license was obtained permitting the exportation.

All of the above were preparations for export and without more no export would arise. However, the following did take place before tax day, March 5, 1945.

6. Payment for the entire cement plant was made by foreign purchaser to domestic seller.

7. Title passed to foreign purchaser.

8. Export forwarding agent took delivery.

9. Contractor-common carrier began dismantling, packaging and loading the cement plant on railroad cars.

On tax day, March 5, 1945, the assessor of Merced County assessed a personal property tax on the whole of the cement plant, notwithstanding the fact that 14 carloads had begun their journey to the sea, two of which had been already loaded on a boat to take them to South America. After tax day:

10. The continued activities of the export forwarding agent, the contractor-common carrier, the railroad carrier, and the steamship carrier consisted of one integrated movement of the ce-

ment plant until the whole of the plant had been shipped out of the County of Merced and out of the United States.

11. The County of Merced reduced the tax 12% by reason of the 14 carloads which had been shipped.

Clearly this is more than a mere intention to export. The degree of certainty that the process of exportation had started as required by *Richfield Oil Corp. v. State Board,* 329 U.S. 69, 82-83, could have no better illustration.

> "* * * The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result."
>
> *A. G. Spalding & Bros. v. Edwards,* 262 U.S. 66, 69.

Appellees pose the question of a foreign purchaser contracting with a seller in this country to furnish a giant telescope. The answer is that it is a contract to manufacture for export and it does not become an export until after it has been completed and started to move as an article of commerce. *Cornell v. Coyne,* 192 U.S. 418. However, suppose a foreign purchaser wished to buy the telescope at the Lick Observatory on Mount Hamilton. We would have an article already manufactured and in existence and when it started to move as an article of commerce to the foreign purchaser, it would be an export and exempt from taxation under the export clause.

III.

APPELLEES' ARGUMENT THAT EMPLOYMENT OF A DISMANTLER AND A FORWARDING AGENT DID NOT CONFER AN EXEMPT STATUS UPON THE PROPERTY TAXED OVERLOOKS ENTIRELY THE FUNDAMENTAL CONCEPT THAT THE PROCESS OF EXPORTATION STARTS WITH THE FIRST MOVEMENT TOWARD THE SEA.

(a)

Apparently appellees have misconceived the appellants' position that it is not necessary that a common carrier be utilized in the exportation of goods. The fact that Bigge Drayage Company was also a common carrier does not detract from its activities in dismantling the cement plant. Nevertheless on page 43 of our opening brief we said:

> "This Court has held in a long and unbroken line of decisions that exportation commences with the first movement of the goods towards the sea. Clearly, the dismantling, packaging and loading operations of the contractor-common carrier was such a movement."

And on page 44:

> "But the Constitution of the United States does not make the prohibition against a state tax on exports dependent upon the formalities with which the exportation is effected."

And in the recent case of *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 82, this Court held that although the certainty that goods are headed to sea and the process of exportation has started may normally be best evidenced by the fact that they have been de-

livered to a common carrier for that purpose, *"the same degree of certainty may exist though no common carrier is involved."* (p. 82.)

Appellees state (A.B. 25) that one of the vital features of the case is the necessity of dismantling and packaging before shipment could occur. It is the position of appellants that the dismantling and packaging were a necessary part of the exporting process. It is very true that no exportation could be had of the cement plant as it was located and in its condition without the employment of a dismantler and packer. Therefore, the employment of Bigge Drayage Company was relevant and appropriate to effect the cement plant's exportation.

> "The expected and accomplished effect of the act was to start them for that port."
>
> *A. G. Spalding & Bros. v. Edwards,* 262 U.S. 66, 69.

Appellants cannot overlook the statements by appellees that none of the property assessed, by March 5, 1945, had been delivered to a common carrier for transportation. (A.B. 26.) Again it is pointed out that the assumption is based upon a credit of 12% of the tax to compensate for the 14 carloads which had been delivered to the railroad common carrier prior to March 5, 1945.

Appellees state (A.B. 26) that "This Court in referring to delivery to a common carrier obviously meant delivery to one who *in the particular situation*

involved was performing the functions of a common carrier." It is well recognized that this Court chooses its language with care and if such were the intent of this Court, it is believed that such language would be employed. This, we believe, is a narrow construction and not within the liberal interpretation accorded export situations by this Court.

See:

Carson Petroleum Company v. Vial, 279 U.S. 95, 105-106.

On almost every page of appellees' brief we are met with the proposition that none of the property taxed had been delivered to the railroad. We repeat that on tax day 14 carloads had been delivered to the railroad and the only justification for such statements is the fact that the tax on the entire cement plant was reduced by 12%.

The law is not concerned with the means of shipment except to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith. Considering the size of the project, we are unable to visualize any other manner of effecting the export by other means.

"*There has been a liberal construction of what is continuity of the journey,* in cases where the Court finds from the circumstances that export trade has been actually intended and carried through."

Carson Petroleum Company v. Vial, 279 U.S. 95, 105-106.

(b)

It is the position of appellants that delivery of goods to an export forwarding agent which has as its purpose the exportation of goods and that the goods as a result of that delivery start to move to a foreign destination as an article of commerce, that such delivery is one of the steps in the process of exportation. This position is exactly contrary to that taken by appellees. (A.B. 28-29.)

Naturally it assumes that the export forwarding agent will follow his calling and not be a manufacturer. If he act as a manufacturer he is not an export forwarding agent. This point raised by appellees (A.B. 29) is without merit.

Appellants take exception to the statement by appellees that it asks this Court to go far beyond the boundaries of any decision which it has rendered on the subject. (A.B. 29.) Appellants believe that if this Court reverses the California Supreme Court and affirms the trial Court that it will reaffirm its consistent position with respect to exports as it did in *Richfield Oil Corp. v. State Board*, 329 U. S. 69.

IV.

APPELLEES' ARGUMENT THAT SHIPMENT PRIOR TO TAX DAY OF A PORTION OF THE PROPERTY SOLD TO A FOREIGN PURCHASER DID NOT CONFER EXEMPTION UPON THE PROPERTY STILL REMAINING IN THE COUNTY ON TAX DAY IS CONTRARY TO THE DECISIONS OF THIS COURT.

This is one of the major points of the instant case. It is the position of appellants that on January 3, 1945, the entire cement plant became an export. On this date delivery was taken by the export forwarding agent; the Bigge Drayage Company began to dismantle, package and load the plant on the cars of the railroad common carrier. This overt act, coupled with the continuity of activity subsequent thereto by the integrated operation of the export forwarding agent, contractor-common carrier, railroad common carrier, and the steamship lines which resulted in the completion of shipment of all of the cement plant out of Merced County, the State of California, and the United States, committed the cement plant to exportation. It is true that on tax day, March 5, 1945, that 14 carloads had left the County of Merced and that a total of 123 carloads was necessary to effect the exportation of the cement plant. That on tax day less than half of the cement plant or approximately 44% had not yet been dismantled. However, the dismantling and other operations were progressing diligently and expeditiously.

Property to be shipped, by its very nature, does not move simultaneously and it would be a very strained construction if this were required. Cattle in corrals at the railroad siding are not loaded all at

once. Grain in granaries at the railroad siding are loaded by chutes and it is elementary that some grain will be loaded first and the last grain loaded will start to move some time afterward.

Take for example the situation in *Richfield Oil Corp. v. State Board*, 329 U.S. 69. In appellant's opening brief in the *Richfield* case in the statement of the case it is related that two cargoes of oil was the export. (p. 19.) As soon as the "Nucla" had docked and was ready to receive the oil, Richfield started pumping it from the storage tanks which were located at the docks into the "Nucla" and continued steadily and without interruption until the entire cargo was delivered. (p. 21.) It is not indicated how long the pumping operations took, but without a doubt there was some lapse of time. This Court said in part:

> "* * * Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad."
>
> *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 82.

Certainly when the first oil came out of the storage tank into the hold of the boat that was the commencement of exportation and committed the entire cargo sold to exportation. Similarly, when the cement plant was delivered to the export forwarding agent and Bigge Drayage Company began to dismantle the plant, this too was the commencement of exportation and committed the entire plant to exportation.

Appellees seem to feel that there must be transportation or carriage before exportation begins. While transportation or carriage must be had at some stage of exportation, it is not necessary that it be the very beginning. The primary question is always whether the means chosen reasonably guarantees delivery to the foreign destination in good faith. As was said by this Court in *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 83:

> "* * * *The means of shipment are unimportant so long as the certainty of the foreign destination is plain.*"

It is regretted that appellees persist in distorting the facts. On page 30 of their brief, they infer that the property sold was not an entire, complete and operative cement plant. For the convenience of the Court and appellees in settling this question, Exhibit "B" is set forth in full in the appendix to this brief. And as heretofore shown, the record is replete with references to the reassembling of the plant, match-marking the parts, taking photographs before and after dismantling in order that the plant might be more easily reassembled, the employment of a consulting engineer and many other references as to the purpose for which the plant was purchased.

Appellees argue that the trial Court assumed in the case of *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469 that not all of the logs were moving on tax day and refer to the record in the case which is not disclosed by the decision itself. We submit that the language of this Court is not ambiguous and that the

rule stated therein is sound and the assumption by the trial judge drawn from the case, if not technically accurate, represents the true rule.

If part of the property sold moves in commerce the entire property sold is committed to that commerce.

Appellees again revert to the fact that the property was divided on tax day for tax purposes. Can it be said that an article is divisible physically as appellees here state (A.B. 33) if by capricious and arbitrary action of the Board of Supervisors of Merced County which passes a resolution almost six months after tax day, the effect of which is to reduce a tax by 12% when the tax should have been canceled completely.

It is not believed that appellees seriously believe that appellants contend that oil in place in the ground or timber standing in the forest is to be exempt because of the existence of an export sales contract.

We cannot help but become alarmed at this new device to tax exports by allocating a percentage to that which is loaded on a railroad common carrier and taxing the balance which is in the process of exportation.

Exception is naturally taken to the broad statement by appellees that we have not been able to cite any cases directly supporting our position. (A.B. 34.) Appellants submit that the California Supreme Court and appellees have distorted the plain facts in order to arrive at their most remarkable and novel conclusion.

V.

APPELLEES' ARGUMENT THAT MOVEMENT SUCH AS WAS INVOLVED IN THE DISMANTLING OF THE PROPERTY WAS PRELIMINARY OR PREPARATORY IN NATURE AND WAS NOT THE FINAL MOVEMENT OUT OF THE STATE LAUNCHING THE PROPERTY UPON ITS JOURNEY TO A FOREIGN DESTINATION IS CONTRARY TO THE PRINCIPLES LAID DOWN BY THIS COURT.

At the outset of appellees' argument under this heading, we are again met with the claim that it is inaccurate to infer that any of the property taxed had been loaded on the railroad cars.

Appellees are apparently under the impression if they repeat this misstatement often enough, it will be believed. Exhibit 12 attached to Stipulation and Agreed Statement of Facts (R. 85) sets forth with particularity the reason for the reduction of the tax by 12%. We quote: "same being for assessment reduction made because 14 cars of machinery were shipped prior to March 5, 1945,". (From resolution of Board of Supervisors.)

The undismantled portion of the plant is compared by appellees (A.B. 35) to coal which had not been mined or oil which still was in the ground or timber which had not been cut. Naturally they are not comparable. The cement plant is in existence and reduced to possession and ownership and is an article of commerce. The other products mentioned in their natural state are not so reduced and are not articles of commerce until so reduced.

And again appellees say (A.B. 35) "none of which had been loaded on the railroad cars at the plant site."

Appellees wish to forget that 14 carloads had been loaded at the plant site and more cars were continued to be loaded.

Appellees pose a question where grain is sold to a foreign purchaser, and asks three questions (A.B. 35) to which they say the answer is no. We submit that the correct answer is: "It all depends."

In *Richfield Oil Corp. v. State Board*, 329 U. S. 69, 82, this Court in quoting *Superior Oil Co. v. Mississippi*, 280 U.S. 390, said:

> "* * * But it added, p. 396, 'Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here.'"

As heretofore been demonstrated that once an article is in existence it may move as an article of trade and become committed to exportation. That preliminary movements and preparation for export are those movements and preparations where it cannot be said with certainty that the intended export will be exported. When it may be said that the certainty of foreign destination is plain and assured, it may then be said that the article or commodity sold is committed to exportation, and this is true even though the entire commodity has not had a chance to move in its entirety. *Richfield Oil Corp. v. State Board*, 329 U. S. 69, 82-83.

Appellees again cite *Coe v. Errol* (A. B. 36) as an example of preparation. Truly this is a very good example. None of the logs were moving in commerce.

Appellees again cite *Cornell v. Coyne* (A. B. 36) as another example of preparation. Manufacturing as we have heretofore shown is for the purpose of bringing into existence an article of trade. Until it becomes such an article it certainly cannot become committed to exportation.

Again appellees repeat "none of the property tax had been loaded on the cars of the railroad." (A. B. 36-37.) 14 car loads had been loaded for which the county arbitrarily reduced the tax 12% instead of canceling the tax.

VI.

APPELLEES' ARGUMENT THAT NO QUESTION OF VALUATION IS PRESENTED IS CONCEDED.

Appellees state (A. B. 37): "Appellants make statements with respect to valuation which we believe do not require an extended answer."

We are not aware of any statements made in appellants' opening brief with respect to valuation nor do appellees refer to any specific page where such statements occur.

The only complaint appellants have with respect to the proceeding before the Board of Supervisors of the County of Merced is that when it was pointed out that the cement plant was moving in commerce on tax

day, that 14 car loads out of 123 car loads was out of the jurisdiction of the County of Merced, and that the entire cement plant was an export, the Board of Supervisors, instead of canceling the tax altogether, only reduced it by 12%.

VII.

APPELLEES' ARGUMENT THAT THE CASES RELIED UPON BY APPELLANTS DO NOT SUPPORT THE POSITION FOR WHICH APPELLANTS CONTEND IS CONTRARY TO FACT.

In order to support its position, appellees must maintain the consistent attitude that none of the cement plant was loaded on the cars of the railroad carrier. We find this statement again on page 38 of appellees' brief.

Having assumed this state of facts, however erroneously, they then cite *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66 quoting from page 70: "The overt act of delivering the goods to the carrier marks the point of distinction between this case and *Cornell v. Coyne*, 192 U. S. 418 * * *" The complete answer is that the *Spalding* case supra is directly in point for 14 carloads had been delivered to the railroad carrier by tax day. Further than that, we think that delivery to the export forwarding agent coupled with the other overt acts of dismantling, packaging and loading is almost on all fours with the *Spalding* case, supra.

Clarke and Co. v. Clarke, 3 Woods 408, is declared by appellees (A. B. 39) not to be applicable. This

case involved the delivery of logs to an exporter and they were held to be exempt from taxation. We submit the circumstances are closely analogous.

Appellees take issue with appellants' statement that the view of the California Supreme Court in this case is directly contrary to the recent decision of this Court in *Richfield Oil Corp. v. State Board*, 329 U. S. 69. An analysis of the governing principles as heretofore outlined in our opening brief and this brief reveals the correctness of our view.

Naturally appellees' statement (A. B. 40) that we even entertain a thought that oil in the ground may become an export is erroneous. They do not specify where such a position is taken by us, nor can they do so.

Appellees cite *Puget Sound Stevedoring Company v. Tax Commission*, 302 U. S. 90, 92, 94, and say (A. B. 41) that it has no application here since none of the property taxed had been loaded. The Court's attention is called to this erroneous assumption that not only 14 carloads had left Merced County but that the process of exportation was continuing expeditiously from January 3, 1945, to the time when the cement plant was completely exported.

Appellees dismiss with scant attention the leading cases of *Cayson Petroleum Company v. Vial*, 279 U. S. 95, 105-106; *Railroad Commission v. Worthington*, 225 U. S. 101, 108-111; *Western Oil Refining Company v. Lipscomb*, 244 U. S. 346, 349-350; *Hughes Bros. Timber Co. v. Minnesota*, 272 U. S. 469, 475; *State of*

Texas v. Anderson, Clayton & Co., 92 F. (2d) 104, 107; *Multnomah County v. Dant and Russell, Inc.*, 158 Ore. 350, 354, 75 P. (2d) 986, and *Dahnke Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290, which have heretofore been discussed in our opening brief.

Suffice it to say that so long as appellees seek to disregard the fact that the contract describes the property sold and that neither the contract nor the cement plant is divisible and so long as they maintain that there was no movement on tax day because the 12% reduction in tax removed the 14 carloads which had been loaded and shipped prior to tax day from their knowledge or sight, their approach to the problem will be unrealistic and strained.

CONCLUSION.

We respectfully submit that the transaction involved in the instant case was an exportation of an entire, complete and operative cement plant indivisible in and of itself and sold under a written contract which was entire and indivisible. That upon payment for the cement plant and passage of title to the foreign purchaser, the entire cement plant was delivered to an export forwarding agent for the sole purpose and no other to export the cement plant to Colombia, South America. That everything which was done was necessary and incidental part of and step in its exportation. A tax upon any incident of that export is clearly forbidden by the Federal Con-

stitution, and the judgment of the Court below sustaining the tax as not in contravention of the Constitution, we submit, should be reversed.

All of which is respectfully submitted.

Dated, Oakland, California,
February 4, 1949.

SCOTT D. KELLOGG,
Counsel for Appellants.

(Appendix Follows.)

EXHIBIT "B".

The following items are excepted from the sale covered by the foregoing contract.

1. All automobiles, office furniture, office fixtures, office equipment, and office supplies.

2. All equipment or other property owned by Pacific Gas and Electric Company.

3. The oil storage house and oil pump house and all equipment and structures used in connection therewith, designated as items 6 and 6A on the Plat attached to and herewith made a part of this Exhibit, together with the railroad spur track leading to said oil storage house and designated as Site No. 2 on the aforesaid Plat including but not limited to the following:

Building #6

Walls—

14½ squares corrugated galvanized iron siding

Framing—

19.4 tons structural steel

202 lin ft 3' 6" high 1¼" 2-member welded pipe rail, posts 4' 0" centers

Roof—

57¼ squares corrugated galvanized iron roofing

Building #6/A

Walls—

3 squares corrugated galvanized iron siding

Framing—

1.8 tons structural steel

Roof—

2¼ squares corrugated galvanized iron roofing

4. All railroad tracks on the premises with the sole exception of the spur track leading into the craneway, designated as Siding No. 3 on the attached plat, which is included in the sale up to the point of switching into Siding No. 1; the switching is excluded from the sale.

5. All cement bags, new or used.

6. All grinding bodies, new or used.

7. Pump, motor, and all other equipment and/or structures used in connection with Well No. 2, as shown on the attached Plat; all well casing now in place in either Well No. 2 or Well No. 1, as shown on said Plat; the underground water main running between the water storage tank and the packhouse and cement silos.

8. The packhouse, all cement silos, and all equipment, and/or structures used in connection therewith, and including but not limited to the following items:

All items shown are complete as installed.

South Packhouse

1 12″ x 68′ Screw Conveyor
2 12″ x 73′-6″ Screw Conveyors
1 12″ x 68′ Screw Conveyor
1 16″ x 47′ Cross Screw Conveyor
98 Steel Slide Valve Bin Gates
98 Chutes
1 Reject Screw Conveyor 9″ x 51′

1 Vertical Continuous Chain Bucket Elevator Type 844-K2 Chain with 7″ x 14″ Style A Buckets. Steel Casing 22″ x 60″ x 48′
1 Hummer Vibrating Screen Frame #5359
1 Packer Bin Screw Conveyor 16″ x 72′
1 Bag Conveyor Belt 30″ x 42′ c-c of Pulleys —Steel Frame
3 Steel Packer Bins 125 Bbls. Cap.
3 Bates 3 Valve Packers
7 5″ 2 Way Fuller-Kenyon Cement Line Valves
1 Admix Feeder—Homemade
1 Small Geared Hand Winch
1 50 Ton Howe Truck Scale Platform 10′ x 60′

North Packhouse

2 Screw Conveyor 16″ x 85′
1 Cross Screw Conveyor 16″ x 26′-6″
1 Bag Conveyor Belt 30″ x 40′ c-c of Pulleys
2 Bates 3 Valve Packer
1 Link Belt Vertical Continuous Chain Bucket Elevator Type 844-K2 chain with 8″ x 14″ buckets Steel casing 18″ x 54″ x 50′
1 Packer Bin Screw Conveyor 12″ x 30′
1 Cross Conveyor to Fuller-Kenyon Pump 9″ x 10′
2 Steel Packer Bins—100 Bbls. Cap.
1 Fuller-Kenyon 4″ cement pump
1 3′ x 5′ Vibrating Screen
3 3 Way Fuller-Kenyon Cement Line Valves
4 2 Way Fuller-Kenyon Valves
38 Steel Fuller-Kenyon 14″ Rotary Bin Withdrawal Valves
38 Chutes

Sack Storage & General

1 Singer Sewing Machine
1 Bag Cleaner
8 Rubber Tired Hand Trucks
1 Small Platform Scale—Howe
1 Small Platform Scale—Fairbanks

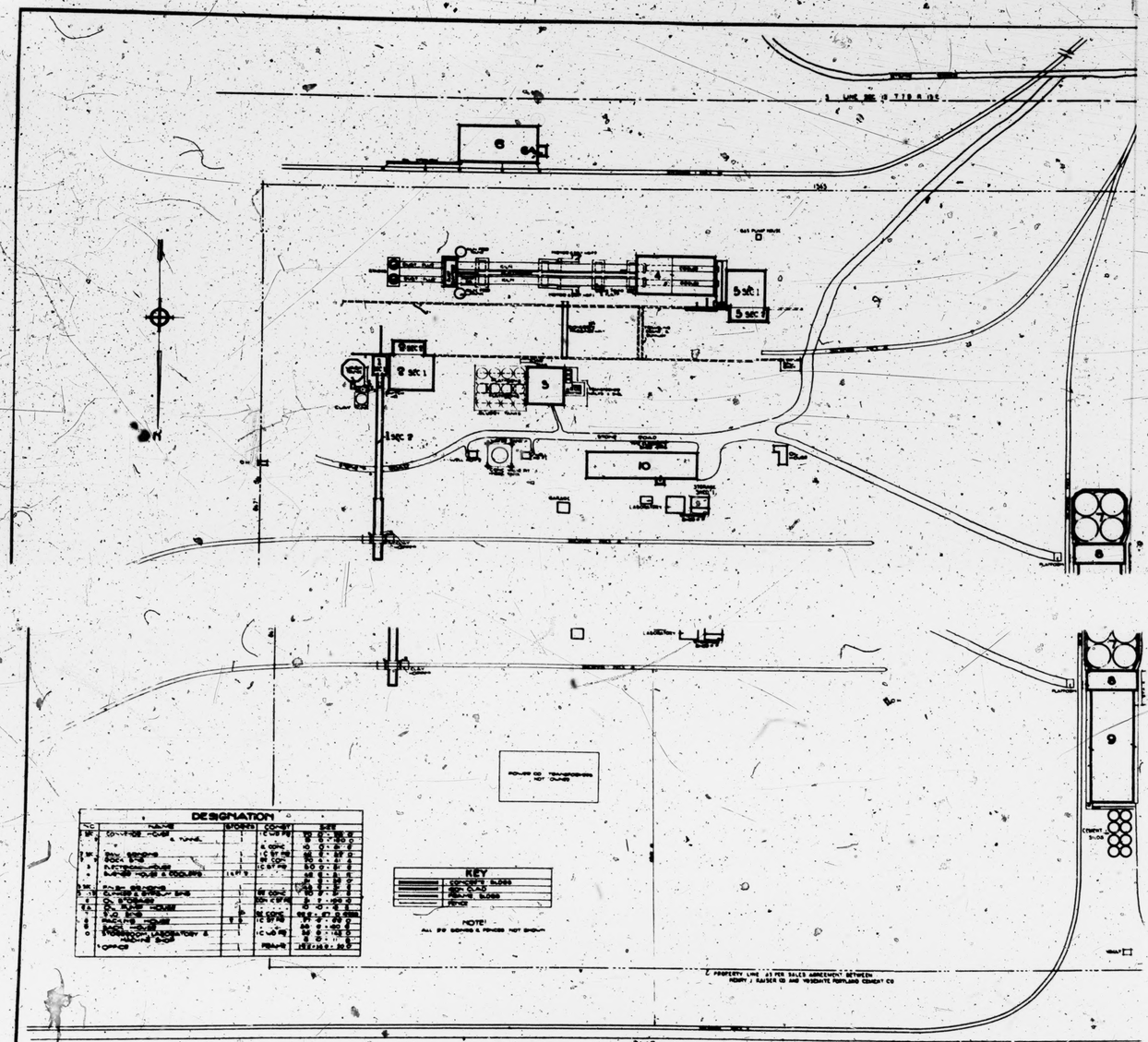
1 Gardner Denver Compressor Model WBH 5014, L.P. 7.5" x 5" H.P. 5.75" x 5", Serial 83962
1 Air Receiver 90 p.s.i. & Air Line 3.5' x 8.0'
1 Bates Bag Tying Machine
800' 5" Cement Line
1 Deepwell Pump
1 Pomona Turbine Pump Serial L 1831

9. All packhouse parts and supplies, including but not limited to the following items:

7 ea. Cones Bates Sack Twine
2 ea. #24-Px8 Grinding Wheels
2 Gross J12 Crescent Rivets
34 ea. #0 Emery Cloth
4 ea. #MUA 1-15/16" Dust Seals
8 ea. #149 Crescent Grip Plates
3 ea. 12" Q Rat Tail Files
9 ea. 8" Tapered Files
2 ea. ½" Street Ells
1 ea. 1 x ½" Reducing Bushing
36 ea. #149 Crescent Long Grip Plates
1 Box #25F Alligator Lacings
100 ea. ⅜" x 1" Machine Bolts
6 ea. ½" x 2½" Machine Bolts
50 ea. ¾" x 5" Machine Bolts
30 ea. ¾" x 5¾" Machine Bolts
18 ea. Cutoff Lever Links #1326C
6 ea. Check Rod Housing #4173C
8 ea. Filling Tube Support #46366
19 ea. Radial Feeder Blades
35 ea. Feed Blade Screws
5 ea. #A 57 Check Rods
3 ea. A62 Cut Off Slides
4 ea. A61 Check Rod Housing Support
2 ea. #6693 Cut Off Levers
8 ea. #9509C Guide Plates
2 ea. #14310 Safety Catches
9 ea. #2918 Bag Clamp Pins
2 ea. #5710 Poise Weight Locking Block

5	ea.	#7999 Cut Off Lever Fulcrum
5	ea.	#24706 Lever & Adj. Screw
4	ea.	#7461 Housing Lever
14	ea.	#14316 Handle Pins
9	ea.	#7492 Housing Liner Screws
14	ea.	#8498 Bag Clamp Release
10	ea.	#4171C Bag Clamp Falk
4	ea.	#13815 Dust Shields
4	ea.	Poise Weight Gag Screws
7	ea.	Safety Latch Brackets
2	ea.	Cut Off Levers #39401
6	ea.	Bates Packer Belts
2	ea.	Bates Packer Springs V-220
8	ea.	Long Wire Tubes 9½"
4	ea.	No. X244 Knives
12	ea.	SAE Cap Screws
10	ea.	Tubes 4½"
4	ea.	Tubes 3"
7	ea.	Bolts No. X261
7	ea.	Cone Wire Tubes X288
13	ea.	Jars No. X258
1	ea.	Jars No. X257
2	ea.	Heads
1	ea.	Core Complete
4	ea.	X305 Valve Tubes
28	ea.	Bates Knife Blades
21	ea.	Scale Beam Weight Cups
1	ea.	#X177 Auto Tying Release Lever
1	ea.	#A48 Bates Packer Bushing
2	ea.	Bates Packer Pinion #4811
1	ea.	Bag Clamp & Latch Bates Packer
1	ea.	#29212 Bag Clamp Cap Extension
6	ea.	#2982 Check Rod Pins
1	ea.	#1431A Bates Discharger Link
1	ea.	Rubber Pad for Bag Clamp
1	ea.	#A 260 Bates Housing Cap Adjust.
1	ea.	#1327C Bates Cut Off Liner Link Bracket
15	ea.	#13414 Check Rod Housing Pins
7	ea.	#3982 Check Rod Housing Pins BP
4	ea.	R.R. Pick Handles

4	ea.	Sledge Hammer Handles
1	ea.	A151 Bates Packer Feeder Gear
2	ea.	1171C Bates Packer Adj. Block
1	ea.	A107 Bates Packer Main Brg. Assbly.
1	ea.	144C Bates Gear End
2	ea.	7444C Bates Jig Shaft Bearing
3	ea.	A95 Bates Packer Housing Comp.
7	ea.	#14 Housing Cap. Bates
14	ea.	Bag Clamp Falks #47510 Bates
2	ea.	2-15/16" Gudgeon Bearings
12	ea.	2-15/16" Hanger Bearings
2	ea.	28 Tooth Sprockets 3" Pitch 3-7/16" Bore
1	ea.	#7460 Stuffing Box Bates Packer
1	ea.	#7460L Stuffing Box Bates Packer
1	ea.	#7460R Stuffing Box Bates Packer
5	ea.	12" Steel Conveyor Flights
73	ea.	600 V 60 amp. Fuse Link #R660
50	Gals.	Algol Compressor Oil
450	Lbs.	Union #5 Cup Grease
9000	ea.	Truck Return Tags
3	ea.	Truck Tongues



PLAT

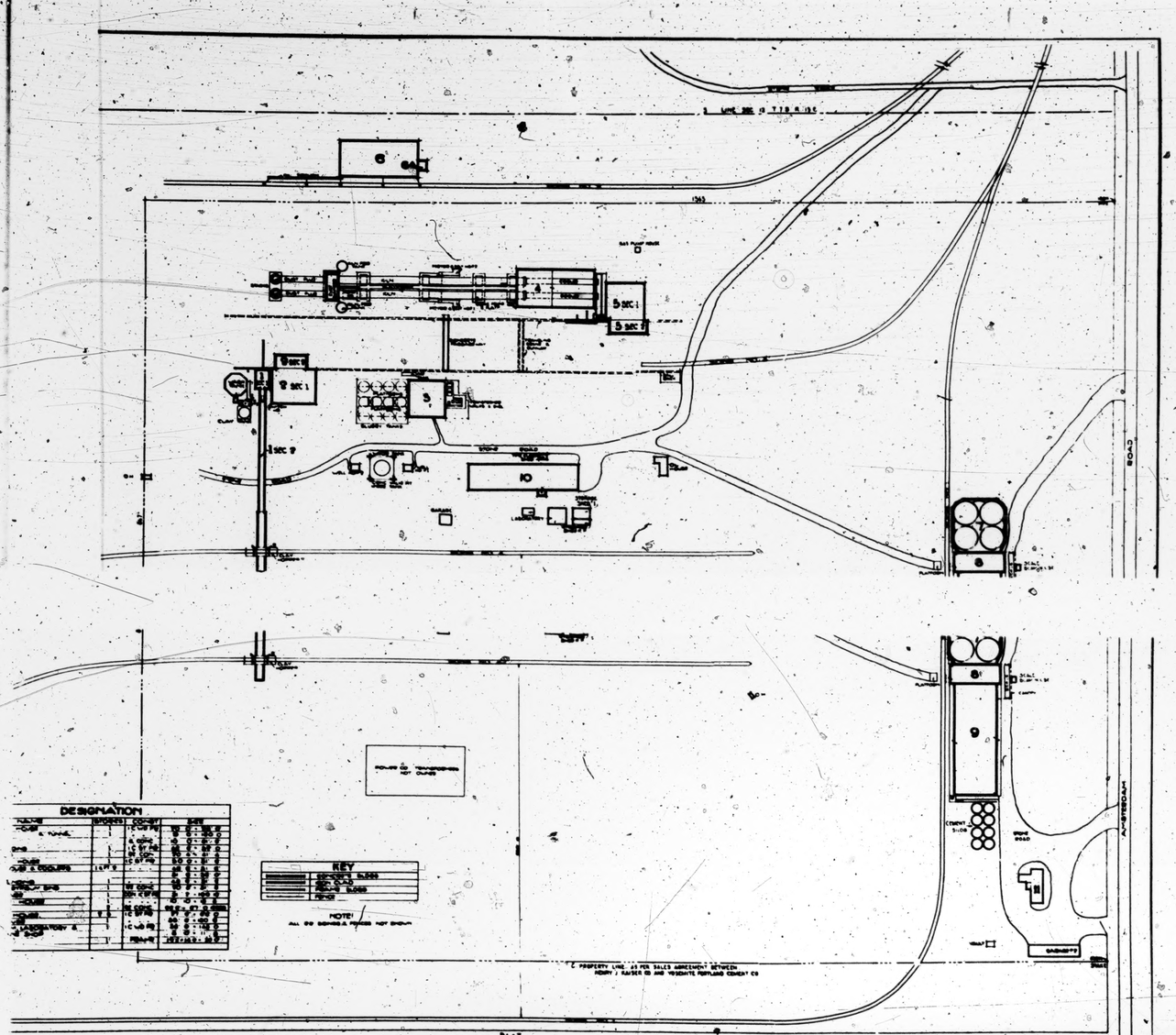
HENRY J. KAISER COMPANY

FORMERLY

YOSEMITE PORTLAND CEMENT CORPORATION

MERCED CALIF.

THE AMERICAN APPRAISAL CO.



PLAT

HENRY J. KAISER COMPANY

FORMERLY

YOSEMITE PORTLAND CEMENT CORPORATION

MERCED CALIF.

WHEREFORE, appellees move the Court to dismiss the appeal in this cause for want of a substantial federal question or, in the alternative, to affirm the judgment of the Supreme Court of California from which this appeal is taken, for the reason that the questions presented are foreclosed by prior decisions of this Court.

Argument in Support of Motion, Statement of the Case, Including the Facts

As part of the statement of facts we wish to point out that while for purposes of convenience the property sold to appellant Empresa Siderurgica, is referred to as the "c ent plant", it included machinery, equipment, removable structures, removable facilities, spare parts, supplies and miscellaneous items. (Tr. 42-45, 54.)* It included such items as gasoline engines, a caterpillar tractor, motors, lathes, wiring supplies, hand tools, twine, furniture and welding equipment and supplies, to mention only a few. (Exhibit 5 of the Agreed Statement of Facts, Tr. 33, 104.) The reference "cement plant" also includes certain machinery, equipment, structures, spare parts and supplies which at one time had been located at a certain quarry at Emory, California, but which, when the contract of sale was entered into, were located at the site of the main plant at Merced. (Tr. 42.)

The estimated status of the property purchased by Empresa Siderurgica, as of tax day, March 5, 1945, was as follows:

12 per cent. had been shipped out of the County; 10 per cent. had been dismantled and crated or prepared for ship-

* As in appellants' Statement as to Jurisdiction, references to the facts stated, unless otherwise noted, will be to the pages of the typewritten Clerk's Transcript on Appeal, upon which the case was reviewed by the Supreme Court of California, and which is included in the transcript certified to this Court.